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February 11, 2008

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Dan Fantozzi
Director
Office of Environmental Affairs
US Department of State
OES/ENV Room 2657A
Washington, DC 20520

Re: Appeal of Final EIS

Dear Mr. Fantozzi:

The Standing Rock Sioux Tribe (SRST) believes that the final version of the Keystone Environmental Impact Statement has grave deficiencies because the Programmatic Agreement (PA) is deficient. Our objections are as follows:

General

Neither the FEIS nor the PA contains specific measures to avoid, minimize, or mitigate adverse effects to historic properties. Rather in several critical entries the PA states that the final measures will be developed in the future by TransCanada. For example, Section V.C.1 of the PA anticipates that the identification of historic properties will not be completed before the start of construction. V.C.2 indicates that TransCanada will develop and submit a plan to Department of State (DOS) that describes the measures (currently unknown) it will implement to complete the identification and evaluation of historic properties. To comply with the stipulations in 36 CFR 800.8(4), the FEIS or the PA must contain these measures, not defer them to some future date.

The Tribal entities on the signatory pages are all listed as concurring parties. For purposes of compliance with Section 106, the Tribal entities must be given the status of consulting parties. Without this status the Tribes have no legal voice in future actions such as those taken regarding inadvertent discoveries. The status of being a consulting party is particularly critical because the PA specifies that TransCanada will be submitting plans affecting the management of historic properties at some

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REVIEW AUTHORITY: ADOLPH H EISNER
DATE/CASE ID: 04 JUN-2010 200902435

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future date. Completing the identification and evaluation of historic properties is a Section 106 process that requires consultation with Tribes, including SRST.

Since the Keystone pipeline crosses areas in eastern North and South Dakota that are within the judicially-established, aboriginal homeland of the Great Sioux Nation, including areas once occupied by the D/Lakota bands comprising the Standing Rock Sioux Tribe, the pipeline may affect historic properties that are of religious and/or cultural significance to the SRST. Because of this potential, 36 CFR 800.2(c) (ii) requires consultation with the SRST. The SRST cannot consult on future actions in the PA unless it is consulting party to the PA.

The ongoing nature of the Section 106 process, as understood by some in the DOS, was emphasized in a January 31, 2008 email sent to Ms. Dianne Desrosiers, THPO officer, Sisseton-Wahpeton Oyate by Mr. H. S. Lee of the DOS:

"Please also note that while the signatory parties will be signing according to the February deadline, this in no way ends the Section 106 consultation process. The PA is designed as a flexible document, giving us the latitude to take all necessary measures to protect cultural resources should unforeseen contingencies arise. We look forward to your continuing input so the PA can work in the manner intended by the Advisory Council on Historic Preservation.

Because the PA envisions the Section 106 process to be ongoing, all Tribes must be consulting parties.

Section V.C.3

The SRST objects to Section V.C.3 which addresses cultural resource inventories on those portions of the Keystone pipeline corridor in North Dakota and South Dakota. The route crosses areas in the eastern parts of these states that, as previously noted, are part of the ancestral homeland of the SRST. The DOS has approved a cultural resource inventory survey procedure that will, when completed, examine less than 23% of the pipeline corridor in the two states. Over 77% of the corridor will not be examined and whatever cultural resources are present will simply be destroyed. The SRST has strongly objected to this process, both directly to the DOS in a letter dated September 12, 2007, and to the Advisory Council on Historic Preservation (ACHP). The ACHP formally raised the issue with the DOS.

In their reply to the ACHP dated November 30, 2007, the DOS asserts that the limited cultural resource inventories conducted in North and South Dakota met the standard of a reasonable and good faith effort. The crux of DOS's position is given in the statements:

"In terms of archaeological methods, the DOS feels confident that the predictive modeling utilized by Metcalf and Associates provided an adequate

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means of anticipating the presence or absence of historic properties and was conducted in a manner consistent with the Secretary's Standards, 36 CFR 800, applicable SHPO standards, and professional practice."

"Metcalf utilized basic sampling techniques that extrapolated the number, classes, and frequencies in unsurveyed areas based on those found in surveyed areas."

Metcalf Archaeological Consultants (MAC) is the cultural resource firm hired to conduct the inventories in North and South Dakota. Similar language is employed by DOS in the FEIS (Section 3.11.1.1 and 3.11.1.2). The SRST asserted in a reply dated December 4, 2007, that MAC could not have used "basic sampling techniques" because the record of previously-recorded prehistoric sites upon which these techniques must be based does not permit the use of these sampling techniques. A copy of the files searches made by MAC was obtained by the SRST. These files indicate that there are only twenty-six previously-recorded, pre-contact sites¹ in the 388 square mile area in North Dakota and only ten such sites in the 736 square mile area in South Dakota. In files searches covering more than a thousand square miles the locations of only thirty-six archaeological sites are known. The SRST presents a data-based argument: statistically valid projections cannot be made from a sample population of thirty-six sites. In contrast, the FEIS never directly addresses the factual data but rather reverts to assertions of authority such as MAC "followed procedures generally accepted by the SHPO and FERC" (FEIS 3.11.1.1). The issue is not whether MAC followed generally accepted procedures but rather whether these procedures are applicable to this specific situation. Because the sampling technique is clearly invalid given the available data, the SRST asserts that the standard of a reasonable and good faith effort has not been met.

In the PA, Section V.C.3. only states that "a reasonable and good faith effort" will be made to complete identification of historic properties in the pipeline corridor in North and South Dakota. It is clear from the language of the FEIS that the DOS has rejected any additional cultural resource inventories in North and South Dakota other than those small areas where the landowner has denied access. The PA does not provide any means for completing reasonable and good faith cultural resource inventories in North and South Dakota.

However, the Tribes have been given mixed messages concerning the possibility of a complete cultural resource inventory. In response to comments made by Ms. Dianne Desrosiers, THPO officer, Sisseton-Wahpeton Oyate, Mr. H. S. Lee of the DOS sent the following email message on January 31, 2008:

"You presented the case that the targeted sampling survey described in the Keystone EIS was not adequate to capture significant cultural resources that could occur along the pipeline corridor, and requested that the State

¹ The SRST cited 18 pre-contact sites in our letter. The total of 26 pre-contact sites includes eight sites with both historic and pre-contact components listed in the FEIS.

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Department consider a request for a 100 percent survey that would extend the approximate 200 mile length of the state from north to south. We would be willing to consider such a request, but would ask please that you put your request in writing to us (an e-mail to me will suffice) as soon as possible."

We hope the DOS is sincere in this reply.

Section V.C.3.a

The SRST objects to Section V.C.3.a. That section addresses the issue of identifying historic properties to which the Indian tribes attach religious and cultural significance. No reports by any tribe on religious and/or culturally significant sites along the pipeline have been posted by DOS. The SRST has not conducted such a study and to the best of the SRST's knowledge, no studies have been made by other Tribes on the Northern Plains.

In a letter dated November 8, 2007, the DOS offered to pay each consulting Indian tribe \$10,000 to conduct a traditional cultural property inventory (TCP) along the pipeline corridor but required that the tribes accepting this offer submit a final report by February 1, 2008. Compared with the 12+ months allowed for the completion of regular cultural resource inventories, the DOS's offer allowed less than four months for the TCP study and required that this study be conducted in the middle of winter when there are obvious, severe weather conditions on the Northern Plains that limit what can practicably be done.

The February 1st deadline, which is again used in the PA, was selected because the DOS has expedited the permitting of the Keystone pipeline. This deadline did not take into consideration whether sufficient time was allowed to complete a TCP study. The SRST objected to the process in a letter to DOS dated November 15, 2007. DOS made no response to the SRST's suggestions for an improved process nor were any of these suggestions acknowledged or incorporated in later documents. As with the general inventories conducted in North and South Dakota, the DOS has failed to make a reasonable and good faith effort to complete a TCP study.

Section V.D.

This section does not address what measures will be taken when a historic property is considered by a Tribe to be of religious and/or cultural significance. Such values cannot be mitigated through standard archaeological excavation.

Section V.D.4 indicates that "TransCanada will draft a comprehensive treatment plan." Signatories and consulting parties are asked to sign a document in which a critical component, the treatment plan, is left undefined. This is unacceptable.

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Section V.H.2.

The SRST objects to Section V.H.2 which addresses vegetative clearing before the completion of cultural resource inventories and TCP studies. Vegetative clearing is an adverse effect. The section must explicitly state that no vegetative clearing will be done on any land prior to completion of the needed inventories and studies on that land.

Section V.F.1.

The SRST objects to Section V.F.1 in which the responsibility for monitoring compliance with the PA is vested with TransCanada. Once construction starts, TransCanada has a vested financial interest in avoiding any construction delays that would be caused by, for example, inadvertent discoveries. Such discoveries may be ignored because they cost TransCanada or their contractors money. Because of this conflict in interest, the responsibility for monitoring must be vested in an entity at arms length from TransCanada.

The SRST objects to limiting monitoring to "selected areas." The entire pipeline corridor must be monitored because inadvertent discoveries, including the discovery of human remains, can occur along anywhere along the corridor.

Section V.F.2.

As previously requested by the SRST, in addition to professionals who meet the Secretary of Interior's standards, there must also be Tribal monitors.

The section does not specify the number of monitors needed. The current wording would allow TransCanada to have, for example, only one monitor for all active construction along the North Dakota segment. In such a case monitoring would be an empty gesture. There must be multiple professional and Tribal monitors, one team assigned to each location where ever there is active, subsurface disturbance.

Section V.G.2.

It is not reasonable to expect that an Environmental Inspector (EI) can be trained within the short time available to perform the duties of a professional who has the qualifications established by the Secretary of Interior. These qualifications include a master's degree and both North and South Dakota SHPOs require additional field experience. An EI cannot be used as a substitute for professional archaeologist.

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Sincerely
STANDING ROCK SIOUX TRIBE

for *Ron Little Eagle*
Ron His Horse Is Thunder
Chairman

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